Danaharta Urus Sdn Bhd v KP Manufacturing Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — GUAMAN SIVIL NO D4–22–1830 OF 2005
ROHANA YUSUF J
17 JANUARY 2008

Limitation — Contract — Guarantee — Debt owed to Bank Bumiputra Malaysia Berhad later vested in plaintiff — Whether limitation could apply — Whether provisions of Pengurusan Danaharta Act 1988 override limitation statute

Statutory Interpretation — Construction of statutes — Rules of construction — Whether there was a conflict between two provisions — Whether provisions of Pengurusan Danaharta Act 1988 override limitation statute

This was an appeal notice by the second and fourth defendants against the decision of the learned senior assistant registrar who had dismissed the application by both defendants to set aside the judgment in default entered against them who were guarantors to the first defendant in a banking facility agreement granted by Bank Bumiputra Malaysia Berhad ('BBMB'). The defendants cited defence with merits in that the action against them had been barred under the Limitation Act 1953. The plaintiff in objecting to the application by the defendants contended that limitation could not apply for two reasons. First, as the debt owed to the BBMB had been vested to the plaintiff, Danaharta Urus Sdn Berhad, the statute of limitation could not apply and secondly, that the date of the accrual of the cause of action should run from the date of foreclosure of the charged property involved. The main issue was whether the provisions of the Pengurusan Danaharta Act 1988 ('Danaharta Act') overrode the limitation statute and thereby precluded the defence of limitation to the defendants. Counsel for the plaintiff also submitted that in the event limitation applied, the date of accrual of action did not favour the second and the fourth defendants as there was evidence of further payment by the defendants through a foreclosure proceeding. Fresh accrual of action took place when the account of the first defendant was paid in part after the foreclosure proceeding on 31 May 2000. The counsel for the defendants raised the issue of whether that part payment would amount to payment made by the defendants remained questionable.

Held, allowing the appeal with costs:

(1) The language in both ss 57(1) and 14(4)(k) of the Danaharta Act made no specific or general reference to issue of limitation. The issue of limitation had not at all been addressed in these provisions, as s 14(4)(k) only dealt with the preclusion of consent requirement either under any agreement or any law that limit Danaharta to dispose assets vested in it save and except the requirements of consent from relevant regulatory authorities or the state authority. As such there was no basis to say that there was a conflict between this provision with that of the Limitation Act to enable an interpretation of giving any overruling effect by the Danaharta Act being a specific law over the Limitation Act being a general law, or the later law over the earlier law. A provision in a statute could not be read to repeat another provision in another statute in absence of clear and specific language to state so (see para 8).

(2) Thus even though all rights, titles and interest was vested in the plaintiff, under the Danaharta Act it could not change in status unless specifically excluded or provided in the Act itself. Section 14(4)(k) of Danaharta Act did not override limitation period nor expand it and in fact was wholly irrelevant to the issue of limitation as a bar to an action (see para 9).

(3) The decision of the High Court in *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186 had in fact by implication been overruled by the court of appeal (see *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1). The court of appeal found the issues of limitation was factually disputed in relation to the date of the accrual of the cause of action which accordingly was a hotly contested issue in that case. With that finding the court of appeal did recognise the applicability of limitation to the case despite being governed by the Danaharta Act. Hence, the fact that the appeal court had given consideration on the issue of limitation at the appeal stage, in the court's view, the decision of the High Court in *Kekatong* on the exclusion of the limitation by the Danaharta Act had impliedly been overruled by the court of appeal (see paras 10–11).

(4) As there were merits in the defence of limitation and the accrual of cause of action, the defendants ought to be given a chance to advance their defences (see para 14).

[Bahasa Malaysia summary

Ini adalah notis rayuan oleh defendan kedua dan keempat terhadap keputusan penolong kanan pendaftar yang telah menolak permohonan kedua-dua defendan untuk mengenepikan penghakiman ingkar yang

dimasukkan terhadap mereka sebagai penjamin-penjamin kepada defendan pertama di dalam satu perjanjian kemudahan pembankan yang diberikan oleh Bank Bumiputra Malaysia Berhad ('BBMB'). Defendan-defendan telah menggunakan pembelaan yang bermerit iaitu tindakan terhadap mereka tersebut telah dihalang di bawah Akta Had Masa 1953. Plaintif dalam membantah permohonan defendan-defendan menegaskan bahawa had masa tidak terpakai atas dua alasan. Pertama, oleh kerana hutang yang terpaksa dibayar kepada BBMB telah diletakhak kepada plaintif, Danaharta Urus Sdn Berhad, statut had masa tidak terpakai dan keduanya, tarikh keakruan kausa tindakan sepatutnya bermula daripada tarikh prosiding halang tebus hartanah yang digadaikan itu. Isu utama ialah sama ada peruntukan-peruntukan Pengurusan Danaharta Act 1988 ('Akta Danaharta') mengatasi statut had masa dan dengan itu menghalang pembelaan had masa kepada defendan. Peguamcara plaintif juga menghujahkan bahawa sekiranya had masa terpakai, tarikh terakrunya tindakan tersebut tidak memihak kepada defendan kedua dan keempat oleh kerana terdapat bukti penjelasan selanjutnya oleh defendan melalui prosiding halang tebus. Keakruan tindakan yang baru terjadi apabila sebahagian akaun defendan pertama dibayar selepas prosiding halang tebus pada 31 Mei 2000. Peguamcara defendan membangkitkan isu sama ada bayaran sebahagian tersebut dibuat oleh defendan-defendan adalah dipersoalkan.

Diputuskan, rayuan dibenarkan dengan kos:

(1) Ungkapan di kedua-dua ss 57(1) dan 14(4)(k) Akta Danaharta tidak membuat rujukan khusus atau am kepada isu had masa. Isu had masa langsung tidak diutarakan oleh peruntukan-peruntukan, seperti s 14(4)(k) hanya berkaitan dengan tidak perlunya keperluan mendapatkan kebenaran di bawah sebarang perjanjian atau undang-undang yang menghadkan Danaharta melepaskan aset-aset yang diletakhak kepadanya kecuali keperluan kebenaran daripada pihak berkuasa yang relevan atau pihak berkuasa negeri. Dengan itu tiada asas untuk menyatakan terdapat percanggahan di antara peruntukan ini dengan Akta Had Masa untuk membolehkan satu pentafsiran yang membolehkan Akta Danaharta sebagai satu undang-undang spesifik mengatasi Akta Had Masa yang merupakan satu undang-undang am, ataupun sesuatu undang-undang yang seterusnya mengatasi undang-undang yang lebih awal. Satu peruntukan di statut tidak boleh dibaca sebagai mengulangi peruntukan distatut yang lain sekiranya tiada bahasa yang jelas dan spesifik yang menyatakannya (lihat perenggan 8).

(2) Dengan itu, walaupun segala, hak, hakmilik dan kepentingan telah diletakhak dengan plaintif, di bawah Akta Danaharta ia tidak

menukarkan statusnya hanya sekiranya diketepikan secara spesifik atau diperuntukan di Akta tersebut. Seksyen 14(4)(k) Akta Danaharta tidak mengatasi had masa ataupun meluaskannya dan sebenarnya langsung tidak relevan kepada isu had masa sebagai penghalang kepada tindakan ini (lihat perenggan 9).

(3) Keputusan Mahkamah Tinggi di *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186 telah sebenarnya secara implikasi ditolak oleh mahkamah rayuan (lihat *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1). Mahkamah rayuan mendapati isu had masa sebenarnya dipertikaikan atas faktanya berhubungan dengan tarikh terakrunya kausa tindakan yang mana ia merupakan isu hangat yang dipertikaikan di dalam kes tersebut. Dengan itu penemuan mahkamah rayuan mengiktirafkan pemakaian had masa kepada kes tersebut walaupun dikuasai Akta Danaharta. Dengan itu, fakta mahkamah rayuan telah memberikan perhatiannya kepada isu had masa ditahap rayuan, pada pandangan mahkamah, keputusan Mahkamah Tinggi dalam *Kekatong* mengenepikan had masa oleh Akta Danaharta telah secara implikasi ditolak oleh mahkamah rayuan (lihat perenggan 10–11).

(4) Oleh kerana adanya merit di dalam pembelaan had masa dan keakruan kausa tindakan, defendan-defendan sepatutnya diberi peluang untuk membela (lihat perenggan 14).]

Notes

For cases on contract generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2173–2782.

For cases on rules of construction, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2013–2031.

Cases referred to

Alias bin Ismail v Hairuddin bin Mohamed & Anor [1997] 3 MLJ 724 (refd)

Danaharta Urus Sdn Bhd v Kakatong Sdn Bhd [2004] 4 MLJ 259 (refd)

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & connected cases [1983] 2 MLJ 227 (refd)

Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor [2002] 6 MLJ 186 (refd)

Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1 (refd)

Pai Khek Meng v Harbi bin Alan [2006] 7 MLJ 189 (refd)

Tio Chee Hing & Ors. v Government of Sabah [1981] 1 MLJ 207

Legislation referred to

Limitation Act 1953 ss 6(a), 26(2)

Pengurusan Danaharta Act 1988 ss 14, 57(1)

A

Ahmad Petra Firdaus Abdullah (WYChan & Roy) for the plaintiff
Chan Siew Cheong (Teh & Lee) for the second and fourth defendants

Rohana Yusuf J:

B

[1] This is an appeal notice in encl 19 by the second and fourth defendants against the decision of the learned Senior Assistant Registrar who had dismissed the application by both defendants to set aside the judgment in default entered against them.

C

BACKGROUND

[2] The judgment in default was entered against both defendants who were guarantors to the first defendant in a banking facility agreement granted by Bank Bumiputra Malaysia Berhad ('BBMB'). The judgment was entered due to the failure of their former solicitor to appear on the date of hearing. The solicitor had apologized and explained by an affidavit in encl 15 that the reason for his absence was because of his inadvertent failure to enter the date in the diary. The defendants cited defence with merits in that the action against them has been barred under The Limitation Act 1953.

D

E

[3] The plaintiff in objecting to the application by the defendants contends that limitation cannot apply for two reasons. First, as the debt owed to the BBMB has been vested to the plaintiff, Danaharta Urus Sdn Berhad, the statute of limitation cannot apply and secondly, that the date of the accrual of the cause of action should run from the date of foreclosure of the charged property involved.

F

G

DEFENCE WITH MERITS

[4] It is the defence case that the notice of demand issued to both defendants dated 22 December 1994 by BBMB shows that default took place prior to that date. Following that notice of demand which gave the defendants 14 days to settle outstanding due, the cause of action against the defendants accrued on 5 January 1995. In view of that date, the limitation to bar any action against the defendants pursuant to the guarantee would have set in on 5 January 2001, by virtue of s 6(a) of the Limitation Act 1953 ('Limitation Act'). Learned counsel for the defendents, Mr Chan Siew Cheong cited the cases of *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & connected cases* [1983] 2 MLJ 227, *Tio Chee Hing & Ors. v Government of Sabah* [1981] 1 MLJ 207, *Alias bin Ismail v Hairuddin bin Mohamed & Anor* [1997] 3 MLJ 724 and *Pai Khek Meng v Harbi bin Alan* [2006] 7 MLJ 189 as authorities in support of his contention.

H

I

Learned counsel argued that the defendants should be given a chance to argue their defences in a proper trial and it mattered not if the defendants would have any chance of succeed or otherwise.

[5] Mr Chan further submitted that even though the plaintiff was vested with the rights, titles and interests of BBMB only on 7 July 1999 limitation had set in on 5 January 2001 and the plaintiff only commenced action on 20 December 2005 which is way after the limitation period.

[6] Learned counsel for the plaintiff Mr Ahmad Petra Firdaus citing the judgment in *Kekatong Sdn Bhd v Bumiputra-Commerce Bank Bhd & Anor* [2002] 6 MLJ 186, submitted that the Pengurusan Danaharta Act 1988 has an overruling effect on the Limitation Act. Azmel J (as he then was) held in that case that the wordings of s 14(4)(k) read with and s 57(1) of the Pengurusan Danaharta Act 1998 ('Danaharta Act') override the provisions of the Limitation Act. The High Court came to that conclusion on the basis that there is a conflict between s 14(4)(k) of the Danaharta Act with that of the Limitation Act. The learned judge finds that the Danaharta Act being a specific and a later legislation overrides the provision of the Limitation Act being a general and later law. In response, Mr Chan for the defendants submitted that based on clear wordings in the cited provisions of the Danaharta Act above there is no room to uphold such interpretation because there is nothing in these provisions that expressly or impliedly override or extend limitation period.

WHETHER THE PENGURUSAN DANAHARTA ACT 1988 EXCLUDES LIMITATION

[7] The main issue for my determination is whether the provisions of the Danaharta Act overrides the limitation statute and thereby preclude defence of limitation to the defendants. Section 14 of the Danaharta Act deals with the subject of vesting of assets. This provision provides for the powers, effects, rights and other implications of vested assets under the Danaharta Act. Section 14(2) clearly provides that the effect of vesting in accordance with the provisions of the Danaharta Act will be binding on any person affected even if it goes against the Civil Law Act 1956 or any other laws. Under s 14(3), from the vesting date Danaharta acquires all rights, titles or interest both present and future in relation to the assets vested. Then s 14(4) provides for a whole list of other implications on the assets vested. For ease of reference I now reproduce s 14(4)(k) of the Danaharta Act below:

> 14(4) Without prejudice to sub-section (1), (2) or (3) in relation to an asset vested in the Corporation:

(k) no provision in any law or agreement limiting or prohibiting the right of the seller or requiring any consent to assign, dispose or transfer such asset shall have any application or effect in respect of any acquisition or disposition by the Corporation, except that disposition of such asset by the Corporation shall be subject to the approval of the relevant regulatory body or relevant State Authority having jurisdiction over such disposition.

[8] Whilst s 57(1) of Danaharta Act empowers Danaharta as acquiree of the assets to dispose the assets by way of private treaty. Having carefully read these two provisions I agree with the submission of learned counsel for the defendants that these two provisions have no reference to issue on limitation. Section 14(4)(k) above in fact precludes the application of law or agreement which limit or prohibit the right of seller or which requires any consent to dispose that assets by Danaharta, except that approvals from the relevant regulatory authorities or State Authority must still be obtained if so required. I find the language in both ss 57(1) and 14(4)(k) of the Danaharta Act make no specific or general reference to issue of limitation. The issue of limitation has not at all been addressed in these provisions, as s 14(4)(k) only deals with the preclusion of consent requirement either under any agreement or any law that limit Danaharta to dispose assets vested in it save and except the requirements of consent from relevant regulatory authorities or the State Authority. As such there is no basis to say that there is a conflict between this provision with that of the Limitation Act to enable an interpretation of giving any overruling effect by the Danaharta Act being a specific law over the Limitation Act being a general law, or the later law over the earlier law. A provision in a statute cannot be read to repeat another provision in another statute in abscence of clear and specific language to state so.

[9] Thus even though all rights, titles and interest vest in the plaintiff, under the Danaharta Act it cannot change in status unless specifically excluded or provided in the Act itself. None of the provision in the Danaharta Act that has denied a defence of limitation, as a bar to an action nor does the Act overrule the period of limitation to an action or the Limitation Act. I find that s 14(4)(k) of Danaharta Act does not override limitation period nor expand it and in fact is wholly irrelevant to the issue of limitation as a bar to an action.

[10] That apart, I also find that the decision of the Appeal Court has in fact by implication overruled that decision. Mr Ahmed Petra for the plaintiff contends that even though *Kekatong* case was brought up to appeal the issue of limitation as held by the High Court was not reviewed by the Appeal Court and remains a good law. I do not agree with that submission. I however agree with the submission of learned counsel for the defendants that the

ruling of the High Court on this issue has been overruled by the Appeal Court. In the Appeal Court case as reported in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 Gopal Sri Ram JCA makes the following observation at p 13:

> The issues raised before the learned judge included the question as to whether the plaintiff was an 'obligor' within the Act. *The other issued related to the question whether the plaintiffs claim was barred by limitation*. The first is a question of law, while the second involves questions of fact. Taking the second point, we need only say that Mr Thomas in his closing arguments conceded that there were several hotly contested issues of fact on the limitation point, in particular, as to when the cause of action arose... (Emphasis added.)

[11] It is clear from the above observation that the Court of Appeal was still considering the 'applicability of limitation 'to the case. The Court of Appeal finds the issues of limitation was factually disputed in relation to the date of the accrual of the cause of action which accordingly was a hotly contested issue in that case. With that finding the Court of Appeal does recognise the applicability of limitation to the case despite being governed by the Danaharta Act. Hence, the fact that the Appeal Court has given consideration on the issue of limitation at the appeal stage, in my view, the decision of the High Court in *Kekatong* on the exclusion of the limitation by the Danaharta Act has impliedly been overruled by the Court of Appeal.

[12] Once again in another High Court case *Danaharta Urus Sdn Bhd v Kakatong Sdn Bhd* [2004] 4 MLJ 259 the issue of limitation was also given consideration in relation to assets vested under the Danaharta Act. In that case James Foong J (as he then was) deliberated on the application for removal of caveats. The dispute on limitation was raised in that case in relation to the computation of accrual of limitation of 12 years and the defendant's attempt to bar the plaintiff from asserting its rights to the land. James Foong J then remarked that limitation is merely a defence available to the defendant but cannot be a cause of action. I agree with the counsel for the 'defence that it is clear fibril this decision in thatcase, that limitation is not excluded in the application of the Danaharta Act. I agree with James Fong J in giving consideration to limitation as being relevant because the Danaharta Act does not override limitation as a bar to an action.

ACCRUAL OF CAUSE OF ACTION

[13] Counsel for the plaintiff further submits that in the event limitation applies, the date of accrual of action does not favour the second and the fourth defendants as there was evidence of further payment by the defendants through a foreclosure proceeding. According to the counsel for the plaintiff fresh accrual of action took place when the account of the first defendant was

paid in part after the foreclosure proceeding on 31 May 2000. Under s 26(2) of the Limitation Act 1953 fresh step revises the date of the cause of action against the defendants by virtue of that part payment. To this, the counsel for the defendants disputed. The counsel for the defendants raised the issue of whether that part payment would amount to payment made by the defendants remains questionable. Further question was raised if Danaharta's sale of the foreclosed property to its subsidiary and deposited to the defendant's account would amount to a fresh payment as envisaged by s 26(2) of the Limitation Act. I find that the merits of this defence of limitation is an issue for trial and need not be pursued at this stage.

[14] In conclusion I find that though this action against the defendants is made by a body created and governed by the Danaharta Act, it does exclude a defence of limitation. I find that the defence of limitation is available to the defendants here and whether or not the defendants succeed on this defence is not an issue before me at this stage. The defendants ought to be given a chance to advance their defences.

[15] I also accept the explanation by the previous counsel for the defendants of his in advertence in not entering the date into his diary as explained in his affidavit in encl 15.

[16] For all these reasons I hereby allow the defendants' appeal notice in encl 19 with costs.

Appeal allowed with costs.

Reported by Sally Kee